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NTSB Order No. EA-4265

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of September, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL K. SZABO, Respondent.	Docket SE-12794

OPINION AND ORDER

Respondent has appealed from an oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in this matter on June 4, 1993.[1] In that decision, the law judge affirmed an order suspending respondent's private pilot certificate for 60 days based on allegations that he landed a Piper PA-28 approximately

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

300 feet behind another aircraft that was still on the runway on its rollout, in alleged violation of 14 C.F.R. 91.65(a) and 91.9.[2] For the reasons discussed below, respondent's appeal is granted as to the section 91.65(a) charge, and denied as to the 91.9 charge. The sanction is modified to a 30-day suspension.

On July 2, 1988, respondent landed a Piper PA-28 aircraft at Bay Bridge Airport, an uncontrolled airport in Stevensville, Md. The pilot of a Mooney aircraft which had landed ahead of respondent (Marilyn DonCarlos) testified that, as she turned off the runway onto the taxiway, approximately 2,000 feet from the landing threshold of the runway, she noticed respondent's aircraft approximately 300 feet behind her on the runway, decelerating. Although Ms. DonCarlos did not actually see respondent's aircraft land on the runway, both she and the Administrator's expert witness deduced from respondent's speed and his proximity behind her aircraft that he must have landed while she was still on the runway. The Administrator's expert witness testified that landing even 2,000 feet behind another

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[2] Section 91.9 [now recodified as 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

14 C.F.R. 91.65(a) [now recodified as 91.111(a)] provided:

§ 91.65 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.
* * *

aircraft on the same runway is unsafe, and could create a collision hazard in the event of equipment failure on one or both of the aircraft.[3] Although respondent denied that there were any other aircraft on the runway when he landed, the law judge accepted Ms. DonCarlos' testimony in its entirety and rejected respondent's contrary version of the events.

In his appeal brief, respondent retreats somewhat from his earlier denial, and admits that the two aircraft "occupied the same runway at the same time" (App. Br. at 19), but takes issue with the law judge's finding that his aircraft *landed* 300 feet behind Ms. DonCarlos' aircraft. He also disputes the law judge's findings of violations, pointing out that no regulation specifically prohibits landing on a runway occupied by another aircraft, and asserts that the law judge's findings of a "potential" collision hazard and "potential" endangerment were insufficient to support those regulatory violations. In addition, respondent argues that the 60-day suspension imposed in this case is excessive.

While the evidence in this case does not necessarily establish that respondent's aircraft landed 300 feet behind Ms. DonCarlos, it does support a finding that respondent landed while

[3] Respondent makes much of the fact that Ms. DonCarlos, a self-described "conservative" driver, maintains only a 150-foot following distance when driving in her car at 55 miles per hour, apparently intending to suggest that the same standard of separation should be considered safe for aircraft traveling at similar speeds during landing and rollout on a runway. There is no support in the record for such a comparison. The law judge's decision is based, as is ours, on the expert testimony regarding safe separation between aircraft, not cars.

her aircraft was still on the runway, and that this was not safe, at least in the circumstances present here. The maximum usable runway length prior to the only available turnoff (which both aircraft used) was some 2,000 feet, and the record shows that this runway is only 60 feet wide (Exhibit A-1). Moreover, respondent was carrying three passengers in the Cherokee 180, a factor which would affect his ability to stop within a short distance. (See Tr. 96.) Hence, this was not a large landing area, nor does the record indicate any reason that visibility was hampered by weather or otherwise. At the hearing, respondent testified that he did not see the DonCarlos aircraft on the runway -- a proposition (1) that would have indicated a deficient scan on his part, and (2) that has been withdrawn, at least implicitly, by respondent's statement on appeal that two planes occupied the runway simultaneously. We believe that in either event there was carelessness -- either deficient scanning and planning of the approach or poor judgment in deliberately landing too close behind an aircraft on rollout.

In sum, we think the record contains sufficient evidence to conclude that respondent's action in this case was careless, in violation of section 91.9. Although, as respondent points out, no actual endangerment resulted in this case, innumerable Board cases make clear that no more than potential endangerment is required to find a violation of section 91.9.[4]

[4] See e.g. Administrator v. Cannon and Winter, NTSB Order No. EA-4056 at 4 (1994), citing Administrator v. Haines, 1 NTSB 769 (1970), aff'd, Haines v. DOT, 449 F.2d 1073 (D.C. Cir. 1971).

We are not convinced, however, that respondent's actions in this case violated section 91.65(a). We agree with respondent that the record contains insufficient evidence to establish that he operated so close to another aircraft as to create a collision hazard. Ms. DonCarlos felt no need to take any evasive action,[5] and admitted that, by the time she first noticed respondent behind she felt the "danger had passed." (Tr. 42.) The Administrator has cited no case law, and we are aware of none, where a section 91.65 violation has been upheld under circumstances such as these.

With regard to the length of the suspension, in light of our dismissal of the 91.65 charge, we believe a 30-day suspension is sufficient. Contrary to respondent's assertions in his brief, neither the delay between issuance of the notice of proposed certificate action and the order of suspension in this case,[6] nor the Administrator's counsel's letter to Ms. DonCarlos asking whether she was still interested in pursuing the complaint (discussed below), nor the absence of a specific regulation prohibiting two aircraft from landing on the same runway at an uncontrolled airport, provides any basis for further mitigation

[5] The fact that an experienced pilot felt compelled to take evasive action to avoid a collision has been held acceptable evidence of a collision hazard. See Administrator v. Tamargo, NTSB Order No. EA-4087 (1994); Administrator v. Willibanks, 3 NTSB 3632 (1981); Administrator v. Werner, 3 NTSB 2082 (1979).

[6] While such a delay might warrant dismissal of the complaint if actual prejudice were shown (see Application of Scrape, NTSB Order No. EA-3957 at 4, n. 7 (1993)), respondent has shown no actual prejudice resulting from the almost four-year delay in this case.

of the sanction.

We turn now to respondent's procedural arguments. First, he challenges the Administrator's last-minute replacement of the expert witness named in his discovery response (the investigating inspector in this case), with another expert witness (the investigating inspector's supervisor). The Administrator informed respondent of the replacement -- necessitated by a medical condition which prevented the investigating inspector from traveling to the hearing -- the afternoon before the hearing. Respondent sought, unsuccessfully, to postpone the hearing and to preclude the substituted witness from being designated as an expert and from testifying in this case, arguing that he was prejudiced by the substitution.

Specifically, respondent asserted at the hearing, and maintains on appeal, that the investigating inspector stated at the informal conference (held prior to issuance of the order of suspension) that this case should not be prosecuted because there was "nothing there" (Tr. 90).[7] Accordingly, he claims that, contrary to the Administrator's pre-trial assurance that the anticipated testimony of the supervisor would be "substantially the same" as that of the originally-designated inspector, the testimony was not the same because the supervisor, having no

[7] Respondent acknowledges that testimony about what was said at the informal conference (which generally relates to potential settlement of the case) is not normally admissible in these proceedings. He asserts, however, that he would have been entitled to elicit the inspector's prior inconsistent statement on cross-examination for impeachment purposes.

knowledge of what was said at the informal conference, could not confirm that the investigating inspector made the alleged statement.

While we are concerned about the perception of unfairness which was apparently created by the Administrator's last-minute replacement of his expert witness, and his claimed inability to provide respondent with more than a few hours notice of the replacement, we do not believe this constitutes reversible error. We agree with the law judge that whatever the investigating inspector might have said at the informal conference is irrelevant to the Board's disposition of the case. The Administrator's factual evidence was presented through the testimony of Ms. DonCarlos. As the law judge indicated, the conclusions he drew from those facts would not have been altered by testimony indicating that the investigating inspector made the alleged comment. Therefore, respondent was not prejudiced by the absence of such testimony.

Respondent also argues that the law judge erred in not allowing him to call the Administrator's counsel as a witness to identify a letter that he sent to Ms. DonCarlos asking whether, in view of the lapse of time since her original complaint (four years) and the possibility that she might be asked to testify at an eventual hearing, she was "still interested in pursuing this complaint." Respondent claims that this letter indicates that the Administrator's case lacks merit. Despite the fact it was not admitted into evidence, we have considered the content of the

letter,[8] and we see no such implication. The Administrator's counsel explained at the hearing, reasonably we think, that the letter was merely an attempt to find out whether the primary factual witness in the case had a sufficient recollection of the events, and whether she was still willing to testify in this matter. The letter is irrelevant to our disposition of this case, and thus respondent was not prejudiced by its exclusion.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted in part and denied in part;

2. The initial decision is reversed as to the finding of a section 91.65(a) violation, and affirmed as to the finding of a section 91.9 violation, and is otherwise affirmed as consistent with this opinion and order; and

3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[9]

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order. Member VOGT submitted the following concurring statement.

[8] The law judge denied admission of the letter into evidence, but it is attached to respondent's appeal brief. The Administrator has not voiced any objection to our consideration of the letter.

[9] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

Administrator v. Szabo, Notation No. 6391A
Concurring Statement of Member Vogt

As I recently wrote in my concurrence in Administrator v. Dowd, NTSB Order No. EA-4111 (1994), I am concerned with expert witnesses being called to testify when not identified in response to a proper discovery request. Here the administrator identified his expert one day before the hearing date because the expert the administrator had originally intended to call could not travel to the hearing due to medical reasons.

Had respondent unsuccessfully moved for a continuance to prepare for the expert, I would have been inclined to vote to remand the case. However, respondent's only stated reason for requesting a continuance was to delay the hearing date when the originally identified expert could testify, so that the respondent could attempt to impeach him based upon statements allegedly made at the informal conference. This is an insufficient ground for a continuance. Respondent has no right to require the Administrator to call an expert of respondent's choosing, and respondent did not subpoena or otherwise attempt to call the expert in his case in chief. Thus I concur with the majority's holding.

C.W.V.